

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JUN 29 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2011-0058-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
JAVIER RAFAEL SOTELO,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CR200501193

Honorable Joseph R. Georgini, Judge

REVIEW GRANTED; RELIEF DENIED

Hernandez, Scherb & Dixon, P.C.
By Richard Scherb

Florence
Attorneys for Petitioner

E S P I N O S A, Judge.

¶1 Petitioner Javier Sotelo¹ seeks review of the trial court’s order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., in which he alleged he had received ineffective assistance of counsel. “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Sotelo has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Sotelo was convicted of two counts of sexual assault and one count of aggravated assault. The trial court imposed consecutive, presumptive, seven-year prison terms for each sexual assault conviction and a presumptive, one-year term for the aggravated assault conviction. This court affirmed Sotelo’s convictions and sentences on appeal. *State v. Sotelo*, No. 2 CA-CR 2007-0226 (memorandum decision filed Dec. 5, 2008).

¶3 Over seven months after our mandate issued, Sotelo filed a notice of post-conviction relief. The trial court appointed counsel, and Sotelo filed a petition for post-conviction relief, in which he alleged trial counsel had been ineffective because he had “lodged untimely objections,” “failed to preserve an appellate record,” “improperly attempted to impeach witnesses,” “violated the rules of disclosure,” “asked improperly formed questions,” and “displayed unprofessional behaviors throughout” trial. The court concluded Sotelo had stated a colorable claim and held an evidentiary hearing on the matter. At the hearing, the trial court heard testimony from Sotelo’s trial counsel and from Sotelo. Afterwards, the court denied relief on Sotelo’s petition, concluding that even had counsel’s performance been deficient, Sotelo had not established prejudice “in view of the strong circumstantial evidence of [his] guilt.”

¹We note that in various court documents and transcripts both on appeal and in this proceeding, Sotelo’s name is also spelled “Sotello.”

¶4 On review, Sotelo reasserts the arguments he made below and contends the trial court erred by, inter alia, disregarding testimony presented at the hearing and “fail[ing] to consider the arguments presented below.” He asks that this court “find that [he] has presented a colorable claim for post-conviction relief and set this matter for an evidentiary hearing.”

¶5 First, as noted above, Sotelo’s notice of post-conviction relief was untimely. Our mandate in his appeal issued on February 11, 2009. His notice of post-conviction relief was not filed until October 7, 2009—almost seven months past the thirty-day time limit of Rule 32.4(a). In the notice Sotelo sought relief under Rule 32.1(f), asserting he “had no knowledge of filing for a notice of post conviction relief” and asking the court to “allow him to file at a later date.” That ground for relief, however, by the rule’s plain language, only applies to an of-right notice of post-conviction relief or to a notice of appeal. Ariz. R. Crim. P. 32.1(f).

¶6 Rule 32.1(f) allows for relief when “[t]he defendant’s failure to file a notice of post-conviction relief of-right or notice of appeal within the prescribed time was without fault on the defendant’s part.” The rule thus allows non-pleading defendants who have failed to file a timely notice of appeal through no fault of their own to seek leave to file a delayed direct appeal. Similarly, the rule provides pleading defendants with the equivalent of seeking such relief. A pleading defendant’s right to review is through a Rule 32 proceeding. *See State v. Smith*, 184 Ariz. 456, 458, 910 P.2d 1, 3 (1996) (“It is through operation of the rules governing post-conviction relief that our constitutional guarantee of appellate review in all cases is effectuated for pleading defendants.”). And such a defendant may seek leave to file a delayed notice of post-conviction relief. The rule therefore gives pleading and non-pleading defendants the opportunity to request a

delayed, first review. But the rule gives only a pleading defendant in an “of-right” proceeding the right to seek leave to file a delayed notice of post-conviction relief.

¶7 Thus, Sotelo’s claim is instead properly characterized as one pursuant to Rule 32.1(a). And, because his claim does not fall within Rule 32.1(d), (e), (f), (g), or (h), no exception to the time limit of Rule 32.4(a) applies. *See* Ariz. R. Crim. P. 32.2(b). Thus, Sotelo was not entitled to relief, and the court could have dismissed his notice and petition solely on that basis. In any event, we reject Sotelo’s request that we remand this matter for an evidentiary hearing.

¶8 As noted above, the trial court granted Sotelo an evidentiary hearing, having concluded he had stated a colorable claim of ineffective assistance of counsel. We therefore review the trial court’s decision after the hearing for an abuse of discretion, *see State v. Ellevan*, 179 Ariz. 382, 383, 880 P.2d 139, 140 (App. 1994), bearing in mind that “[t]he trial judge is present at the trial and can better evaluate the cogency of evidence. The trial judge can also better assess the relationship between counsel’s defective performance and the verdict,” *State v. Gerlaugh*, 144 Ariz. 449, 458, 698 P.2d 694, 703 (1985).

¶9 As the trial court correctly stated in its ruling, to prevail on a claim of ineffective assistance of counsel, a defendant must show counsel’s performance was deficient under prevailing professional norms and the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Ysea*, 191 Ariz. 372, ¶ 15, 956 P.2d 499, 504 (1998). And if a defendant fails to make a sufficient showing on either element of the *Strickland* test, the court need not determine whether the other element was satisfied. *State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985).

¶10 In this case, we cannot say the trial court abused its discretion in concluding Sotelo had failed to establish he was prejudiced by counsel’s allegedly deficient performance. In its decision, the court set forth the substantial evidence against Sotelo, which we described in our decision on appeal as “overwhelming,” *Sotelo*, No. 2 CA-CR 2007-0226, ¶ 14, and explained that it could not find “a reasonable probability that the verdict would have changed” had counsel’s performance been different. We see no reason to repeat the court’s analysis here. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993) (when trial court has ruled correctly on issues raised “in a fashion that will allow any court in the future to understand the resolution[, n]o useful purpose would be served by this court[’s] rehashing the trial court’s correct ruling in a written decision”). Thus, although we grant the petition for review, we deny relief.

/s/ *Philip G. Espinosa*

PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ *Joseph W. Howard*

JOSEPH W. HOWARD, Chief Judge

/s/ *J. William Brammer, Jr.*

J. WILLIAM BRAMMER, JR., Presiding Judge